

Honorable Judge Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CLYDE RAY SPENCER ,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' FRCP 50(a) MOTION
FOR JUDGMENT AS A MATTER OF
LAW

NOTED: January 24, 2014

I. INTRODUCTION

Defendants Davidson and Krause hereby move for judgment as a matter of law pursuant to FRCP 50(a). Defendants' trial brief and briefs in support of summary judgment are incorporated herein by reference.

II. LAW AND ARGUMENT

A. Summary of Remaining Issues at Trial

This Court previously granted in large part defendants' summary judgment motions and dismissed many of plaintiff's claims. *See, e.g.*, Dkt. 91, 93, 97, 98, 174, 179, 180, 182, 186, and 187. However, the Court denied summary judgment on defendants' affirmative defense of qualified immunity from plaintiff's claim of deliberate fabrication of evidence. Dkt. 180 pp. 26-27; Dkt. 187, p. 12.

1 In order to establish liability for alleged deliberate fabrication of false evidence,
 2 plaintiff “must, *at a minimum*, point to evidence that ... Defendants continued their
 3 investigation ... despite the fact that they knew or should have known that he was innocent
 4” *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (italics in original); *see also id.*
 5 at 1077 (“What is required is ... a showing that the interviewer knew or should have known
 6 that the alleged perpetrator was innocent”).
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8 The Court’s summary judgment rulings have made the false arrest, malicious
 9 prosecution, false imprisonment, and conspiracy claims dependent and contingent upon
 10 plaintiff proving his deliberate fabrication of evidence claim. Specifically, the Court’s analysis
 11 of plaintiff’s claims against defendant Krause began as follows:

12 The Court begins its discussion of qualified immunity with an analysis of
 13 whether the evidence demonstrates that a genuine issue of material fact exists
 14 that Krause ... fabricated evidence against him regarding the abuse. The Court
 15 starts its analysis here because if genuine issues of material fact exist as to the
 16 aforementioned issues, then more likely than not there will be genuine issues of
 material fact related to Mr. Spencer’s claims that probable cause did not exist,
 Krause was involved in the alleged conspiracy to imprison Mr. Spencer, and she
 was a proximate cause of Mr. Spencer’s injuries.

17 Dkt. 180, p. 19, 1. 17 - p. 20, 1. 2. Consistent with this analysis, the Court ultimately ruled on
 18 plaintiff’s claims against defendant Krause as follows:

19 Because there are genuine issues of fact regarding whether Krause fabricated
 20 evidence in the child victim statements, which was, in large part, what the
 21 Prosecutor’s Office relied on to find probable cause existed and to charge Mr.
 22 Spencer with multiple counts of abuse (Dkt. 168-11 at 11 and 14), the Court
 cannot grant qualified immunity on the basis that probable cause exists and
 must deny summary judgment on Krause’s claims of false arrest, malicious
 prosecution and false imprisonment. *See supra*.

23 Dkt. 180, p. 31, 11. 17-22. Due to this question of fact regarding whether the children’s
 24 statements were deliberately fabricated, the Court also denied summary judgment on plaintiff’s
 25 conspiracy claim. Dkt. 180, p. 39, 11. 7-14. This same question of fact also caused the Court to
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1 deny summary judgment based on lack of proximate cause. *Id.* at ll. 16-19.

2 The Court followed the same analysis and rendered the same ruling with regard to
3 plaintiff's claims against defendant Davidson. The Court's analysis of plaintiff's claims against
4 defendant Davidson began as follows:

5 The Court begins its discussion of qualified immunity and supervisory liability
6 with an analysis of whether the evidence demonstrates that a genuine issue of
7 material fact exists regarding whether Davidson fabricated evidence against Mr.
8 Spencer or whether he may be liable in his supervisory capacity for Krause's
9 alleged fabrication of evidence. The Court starts its analysis here because if
10 genuine issues of material fact exist as to these issues, then it is also likely that
there will be genuine issues of material fact related to whether probable cause
existed, Davidson was involved in the alleged conspiracy to imprison Mr.
Spencer, and he was a proximate cause of Mr. Spencer's injuries.

11 Dkt. 187, p. 8, l. 17 - p. 9, l. 3. Applying this analysis, the Court ruled as follows:

12 Whether Krause fabricated the children's statements, whether Davidson knew
13 or should have known of Krause's conduct and to what extent he participated in
14 the fabrications, and whether the alleged fabrications are evidence of Mr.
15 Spencer's innocence are all factual determinations for the jury to make.
16 Therefore, the Court declines to grant Davidson qualified immunity on the
claims that he knew of deliberately fabricated evidence or is liable as a
supervisor for Krause's fabrication.

17 Dkt. 187, p. 12, ll. 15-20.

18 Due to the question of fact regarding whether the children's statements were deliberately
19 fabricated, the Court further denied Davidson's motion that he was entitled to qualified
20 immunity based on probable cause, ruling as follows:

21 Because the investigative reports containing the alleged fabrications were, in
22 large part, what the Prosecutor's Office relied on to find probable cause existed
23 and to charge Mr. Spencer with multiple counts of abuse (Dkt. 168-11 at 11 and
24 14), the Court cannot grant qualified immunity on the basis that probable cause
25 exists. Therefore, summary judgment is denied on the claims for false arrest,
malicious prosecution and false imprisonment.

26 Dkt. 187, p. 13, l. 19 – p. 14, l. 2. The Court similarly denied summary judgment regarding

1 plaintiff's conspiracy claim due to the question of fact regarding whether the children's
 2 statements were deliberately fabricated. Dkt. 187, p.18, l. 20 – p. 19, l. 10. Based on the same
 3 question of fact, the Court denied summary judgment on the grounds that proximate cause was
 4 lacking, ruling as follows:

5 Because there are genuine issues of material fact as to the fabrication of
 6 evidence against Mr. Spencer and Davidson's role with respect to the alleged
 7 fabrications and the continuance of the investigation, a genuine issue of material
 8 fact also exists regarding whether or not Davidson was a proximate cause of Mr.
 9 Spencer's alleged injuries. Therefore, summary judgment is denied on this
 10 basis.

11 Dkt. 187, p. 19, ll. 12-16.

12 Another important consideration defining the extent and scope of the issues left for
 13 resolution by the jury is that the Court has already ruled as a matter of law that in the absence of
 14 deliberate fabrication of the children's statements in Krause's reports, the Prosecutor's Office
 15 reasonably concluded that probable cause existed to file and prosecute the charges in the
 16 original, amended and second amended informations involving all three victims. *See* Dkt. 174,
 17 p. 15, l. 17 - p. 28, l. 15. Based on this finding of probable cause, the Court summarily
 18 dismissed the false arrest, malicious prosecution, false imprisonment and conspiracy claims
 19 against former defendant Peters. *Id.* Thus, if the jury concludes the children's statements were
 20 not deliberately fabricated, probable cause exists, which is a complete defense to plaintiff's
 21 remaining claims. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054-55 (9th Cir. 2009).

22 **B. Insufficient Evidence Defendants Should Have Known Plaintiff Was Innocent**

23 Defendants move for judgment as a matter of law on the deliberate fabrication of
 24 evidence claim because plaintiff failed to produce evidence sufficient to enable a reasonable
 25 jury to conclude that defendants knew or should have known that he was innocent of any and all
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1 crimes for which he was charged. Plaintiff adduced absolutely no evidence defendants actually
2 knew he was innocent since they did not call either defendant to testify about this pivotal issue.
3 He also failed to adduce any evidence that either defendant should have known plaintiff was
4 innocent.

5 By the time plaintiff rested his case, Shirley Spencer had testified her step-daughter
6 Kathryn Spencer had disclosed sexual abuse by plaintiff before any police officers had any
7 involvement in this case (*see* Ex. A-5). Also, before defendants had any involvement in this
8 case, Sacramento County Sheriff's Detective Flood had independently reported Kathryn
9 confirmed that she made the disclosure of sexual contact by her father to Shirley, albeit
10 inconsistently (*see* Ex. 75). Shirley Spencer later testified to the subsequent out-of-character
11 fears of a bubble bath and a rectal thermometer by her four year old son Matt Hansen, which led
12 to little Matt Hansen's disclosures of sexual abuse by plaintiff (*see also* Exs. 15-17, 44).
13 Former elected Clark County Prosecuting Attorney Arthur Curtis and former King County
14 Deputy Prosecuting Attorney Rebecca Roe, who specialized in child sex crimes, both testified
15 that they objectively believed plaintiff was not innocent, and instead believed plaintiff had
16 probably molested his daughter Kathryn before the original Information was filed (*see also*
17 Roe's November 27, 1984 report, Ex. 27, and the Information, Ex. 31), and both also testified
18 that their belief in plaintiff's probable guilt only grew stronger when the two additional victims,
19 Matt Hansen and Matt Spencer, subsequently disclosed abuse by plaintiff (*see also* Exs. 14-17,
20 32-34). Additionally, plaintiff's testimony confirmed that he took a polygraph examination
21 which resulted in findings indicative of deception on the relevant questions regarding abuse of
22 his daughter (*see also* Ex. 42). Further, defendants were aware plaintiff had been fired from his
23 job as a police officer with the Vancouver Police Department based in part upon findings that he
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1 had lied to his superiors during an undercover operation, and had raped a neighbor's high school
2 age daughter before becoming a Vancouver police officer (*see also* Exs. A-30 – A-32). Plaintiff
3 admitted on cross-examination that he repeatedly made statements to defendants, his attorney
4 and the Judge who presided over his change of plea hearing and sentencing to the effect that he
5 could not remember if he had committed the crimes, and he specifically admitted telling
6 defendants at the time of his February 28, 1985 arrest "I must have done it if Little Matt said I
7 did, this can't be my ex-wife this time" (*see also* Exs. 8, 68, A-22). In other words, the
8 evidence is that even plaintiff did not fully believe he was innocent of sexually abusing one or
9 more of his children.
10

11 The only evidence adduced by plaintiff remotely suggesting defendants should have
12 known during the 1984-85 time period that he was innocent included the opinion testimony of
13 Dr. Raskin, who was critical of the qualifications of the polygrapher who administered
14 plaintiff's polygraph and opined that the polygraph exam was substandard and the results were
15 invalid. While plaintiff disputed the authenticity of Shirley Spencer's handwritten statement
16 documenting Kathryn's initial disclosure and some of the details included in it, he did not
17 dispute that Kathryn made an unsolicited disclosure to Shirley that he had sexual contact with
18 her, or that Shirley documented the disclosure in a handwritten statement. Plaintiff also testified
19 that his sexual relationship with the high school age neighbor girl was consensual, and he
20 denied that he lied to his superiors at the Vancouver Police Department. Finally, he offered the
21 testimony of Kathryn Spencer and Matt Spencer who recanted or partly recanted their
22 disclosures of abuse decades later, even though they had both previously testified under oath
23 that they had disclosed sexual abuse to Detective Krause back in 1984 and 1985 (*see also* Exs.
24 65, 66, 68, 76, 77).
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On this record, a reasonable jury could only conclude that defendants did not actually know and should not have constructively known in 1984-85 that plaintiff was innocent of any and all crimes for which he was charged. There also is no evidence defendant Davidson knew or should have known Detective Krause allegedly fabricated evidence in her police reports. As Rebecca Roe testified, a reasonable person reading those reports could not have known they were fabricated. Since there is insufficient evidence of defendants' actual or constructive knowledge of plaintiff's innocence is an essential element of plaintiff's deliberate fabrication of evidence claim, this claim should be dismissed.

C. Insufficient Evidence of a Conspiracy

Defendants also move for judgment as a matter of law on plaintiff's conspiracy claim because plaintiff failed to introduce sufficient evidence of an agreement or meeting of the minds between defendants to deprive plaintiff of a constitutional right. *See Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010). Specifically, plaintiff alleges defendants conspired to frame him for crimes he did not commit so defendant Davidson could pursue a relationship with plaintiff's then wife, Shirley Spencer, which he alleges, but failed to prove, started during the criminal investigation sometime in or after October 1984, after Kathryn's disclosures to Shirley Spencer and Sacramento Detective Flood.

At the time plaintiff rested at trial, he had produced no direct or even circumstantial evidence that such a relationship existed during the investigation. To the contrary, Shirley Spencer specifically testified that she was angry with defendant Davidson during most of the investigation because she still loved her husband and believed in his innocence, and that she did not start seeing Davidson socially until approximately one month after plaintiff entered his *Alford* plea and was sent to prison. Plaintiff introduced no evidence from defendant Davidson

1 regarding when he developed a relationship with Shirley Spencer, although he has consistently
 2 testified that the relationship did not form until after plaintiff's conviction. *E.g.*, Dkt. 134-2, pp.
 3 8-9, 19. Thus, there is insufficient evidence to enable a reasonable jury to conclude that a
 4 relationship between Davidson and Shirley Spencer existed during the investigation, or to make
 5 the necessary reasonable inference of an agreement or meeting of the minds between defendants
 6 to frame plaintiff so that such a relationship could be pursued.
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8 Plaintiff admitted on cross-examination that if the evidence did not support his claim
 9 that defendant Davidson and Shirley Spencer were engaged in a relationship during the
 10 investigation, his conspiracy claim would fail. Plaintiff introduced no evidence of an agreement
 11 between defendants to frame him, and he introduced no evidence from which a reasonable jury
 12 could infer that either defendant had any motive to do so other than the nonexistent relationship.
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14 Based upon these facts, defendants respectfully request that this Court find as a matter of law
 15 that plaintiff has failed to adduce sufficient evidence of the requisite agreement or meeting of
 16 the minds between defendants to deprive him of a constitutional right, and should enter an order
 17 dismissing the conspiracy claim against defendants.

18 **D. Insufficient Evidence Davidson Deliberately Fabricated Evidence**

19 Defendant Davidson alternatively moves for judgment as a matter of law on plaintiff's
 20 deliberate fabrication of evidence claim because plaintiff introduced no evidence that he
 21 participated in preparing any of the allegedly fabricated police reports, or directed defendant
 22 Krause in any way about the content of those police reports. There also was no evidence he
 23 participated in any of the child interviews prior to plaintiff's conviction and imprisonment. The
 24 evidence was that the only child interview he participated in was an interview of little Matt
 25 Hansen after plaintiff's conviction when the police were investigating big Matt Spencer's May
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9, 1985 disclosure to James Rulli and Jim Peters that other police officers may have also sexually abused the children, which had nothing to do with the completed investigation of plaintiff. Additionally, plaintiff failed to adduce any evidence defendant Davidson knew about the existence of any medical reports or the December 1984 videotaped interview of Kathryn, or that he participated in any way in the alleged failure to timely disclose the same to plaintiff's criminal defense attorney prior to trial. Thus, there is insufficient evidence for a reasonable jury to conclude that defendant Davidson fabricated any evidence in the challenged police reports.

III. CONCLUSION

Based on the foregoing reasons, and the reasons set forth in defendants' trial brief and summary judgment materials, defendants are entitled to judgment as a matter of law pursuant to FRCP 50(a).

RESPECTFULLY SUBMITTED this 24th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, I caused to be electronically filed Defendants' FRCP 50(a) Motion for Judgment as a Matter of Law with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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